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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 787

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,

*Petitioner,*

*vs.*

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, JOHN PETER CHRISTENSEN, ANNA CHRISTENSEN, JOHN H. BUSCH, JR., PETER VISSER AND WILLIAM STERNBERG,

*Respondents.*

## REPLY BRIEF OF PETITIONER.

O. JOHN ROGGE,
*Counsel for Petitioner.*

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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## REPLY BRIEF OF PETITIONER.

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MAY IT PLEASE THE COURT:

Two misstatements of fact in respondents' brief require correction.

On page 3 it is charged that "if the reinsurance agreement is to be stricken down here, it must be stricken down in its entirety and the many policyholders of the American Old Line are left without insurance". All authorities recognize the power of a court to refuse to enforce an illegal provision in a contract without affecting the enforcibility of the lawful provisions therein. In the present

case, in which the unlawful assumption of stockholders liability cannot be enforced, it does not follow that the insurance provisions should not be enforced.

Nor does the record support respondents' assertion that "the many policyholders of the American Old Line are left without insurance". Respondents' admission (p. 3) "that after the approval of the contract by the Ohio Superintendent of Insurance alone, it (petitioner) carried out the contract" is a frank recognition by respondents that the Ohio National Life Insurance Company has fully performed its *reinsurance* commitments to policyholders. This was done by the execution of separate and individual contracts of insurance, which are not affected by the invalidity of the old agreement.

On page 13 respondents assert, without any support in the record, that "appellee apparently reduced its payment to the American Old Line by the sum of $139,800 because of the liability of the American Old Line on account of its bank stockholdings". This deduction is wholly untrue and is tacitly so recognized by respondents' use of the word "apparently" to qualify the erroneous statement.

On pages 4 and 5 respondents object to petitioner's characterization of the bank stockholders liability as "contingent in incidence and uncertain as to amount" when the Re-Insurance Agreement was entered into. Suffice it to say that the Circuit Court of Appeals, whom respondents assert is "well acquainted with the nature of bank stockholders liability under the Illinois Constitution" twice used the term "contingent" in describing this liability (R. 108, 110). The Circuit Court of Appeals also stated that the liability of the American Old Line "was fixed" on June 13, 1934, (four years after the reinsurance agreement was consummated) and that with respect to said Re-Insurance Agreement, the stockholders liability "subsequently accrued" (R. 110, 111). Petitioner there-

fore submits that its characterization of this liability as *contingent in incidence and uncertain as to amount* when the Re-Insurance Agreement was entered into, conforms strictly to the opinion of this liability by the Circuit Court of Appeals.

There are two short answers to respondents' lengthy argument on *ultra vires*. First, the defense of *ultra vires* is not abolished in Ohio as to insurance companies, banks, and other corporations not organized under the General Corporation Act. *U. F. Oratinese* v. *Picciano*, 129 Oh. St. 466, 196 N. E. 155; *Ulmer* v. *Fulton, Supt.*, 129 Oh. St. 323, 340-342, 195 N. E. 557. Second, special corporations such as banks, building and loan associations, and insurance companies can raise the defense of *ultra vires* even though the contract is completely executed. *Ulmer* v. *Fulton, Supt.*, 129 Oh. St. 323, 342, 195 N. E. 557; *Gardner* v. *Johns*, 64 Oh. App. 229, 18 Oh. Op. 80. Both of these propositions are supported by statutes and judicial decisions of Ohio, contrary to the contentions of respondents.

Petitioner fully paid for all it received from the American Old Line Insurance Company. It paid $781,720 in cash (R. 110). Respondents were not injured thereby. They contributed nothing to this payment. They lost nothing thereby, as they have their remedy against the $781,720—even if it is in the hands of stockholders of the American Old Line. *Singer* v. *Hutchinson*, 183 Ill. 606, 619; *Gaskins* v. *Bonfils*, 79 F. (2d) 352, 355.

## CONCLUSION.

It is respectfully submitted that petitioner's alleged assumption of stockholders liability, contingent in incidence and uncertain as to amount, by an unauthorized and unapproved reinsurance agreement is void, and that the decision of the Circuit Court of Appeals imposes an unjust burden upon petitioner, presents an unmerited windfall to respondents, and is contrary to all applicable statutes and decisions.

Respectfully submitted,

O. JOHN ROGGE,
*Counsel for Petitioner.*